10-11-2011

Kinghorn v. Clay Appellant's Reply Brief Dckt. 38109

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRYSTAL M. KINGHORN, f/k/a KRYSTAL M. BARRETT

Plaintiff-Respondent,

v.

KELLY N. CLAY, an individual,

Defendant-Cross-defendant-Appellant,

and

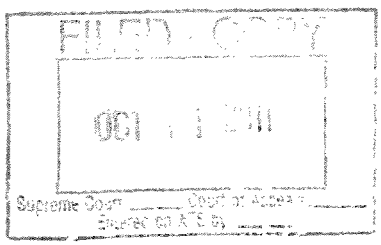
BRP INCORPORATED,

Defendant-Crossclaimant-Respondent,

and

BANK OF COMMERCE,

Defendant.



Supreme Court Docket No. 38109-2010

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Fremont County.
Honorable Jon J. Shindurling, District Judge, presiding.

Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Appellant,
Kelly N. Clay

Bradley J. Dixon, Esq., residing at Boise, Idaho, for Respondent,
BRP Incorporated

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ARGUMENT

I.

CLAY CLARIFIES RELEVANT FACTS.

Kinghorn and Clay understood that Clay had a valid claim for breach of the loan agreement against Kinghorn who did not pay in full the amount Clay cosigned at the bank.[1] Kinghorn and Clay agreed pursuant to stipulation to account for damages arising from their competing claims.[2] Clay and Kinghorn asked the district court to rule on an accounting after entering the stipulation.[3] When the court entered its order based on Kinghorn and Clay's stipulation, it awarded Clay his damages for Kinghorn's breach of the loan agreement in the stipulated amount of $22,235.33.[4]

Thus, the issue of Clay's claim against Kinghorn for breach of contract was dealt with in the stipulation, which the court accepted and ruled on in Clay's favor.[5] The efforts of Attorney Smith led to Clay recovering this $22,235.33 amount.[6] Before Attorney Smith entered the case, Clay was looking at paying Kinghorn damages without even any offset for the amount Kinghorn owed Clay.[7]

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1 R Vol. I, p. 199.
2 R Vol. I, p. 174.
3 R Vol. I, p. 174.
4 R Vol. II, p. 210.
5 R Vol. I, p. 174.

II.

ATTORNEY SMITH HAS A LIEN UNDER IDAHO CODE § 3-205 IN LIGHT OF I.R.C.P 15(b), PUBLIC POLICY, EQUITY, THE INTENT OF THE CHARGING LIEN STATUTE, AND THE CHARGING LIEN STATUTE ITSELF.

A. Clay Recovered $22,235.33 On His Claim For Breach Of The Loan Agreement That The Parties Tried To The Court On Clay's Counterclaim Pursuant to I.R.C.P. Rule 15(b).

Relying on the language of Idaho Code § 3-205, BRP claims that Attorney Smith cannot have a lien under § 3-205 because Clay did not recover on a counter claim in which Clay sought affirmative relief. Idaho Code § 3-205 reads as follows:

> From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come.

Specifically, BRP latches onto the counterclaim requirement in Idaho Code § 3-205 to support its argument that Attorney Smith cannot have a lien because Clay never filed a counterclaim.

However, Idaho Rule of Civil Procedure 15(b) states:

> *When issues not raised by the pleading are tried by express or implied consent of the parties, they **shall** be treated in **all** respects as if they had been raised in the pleadings.* Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; ***but failure so to amend does not affect the result of the trial of these issues.***

I.R.C.P. 15(b) (emphasis added). "If the trial court grants relief not specifically pled by the parties, then the issue must be tried by express or implied consent of the parties." *O'Connor v. Harger*

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6 R Vol. II, p. 210.
7 R Vol. I, pp. 141-47.

Const., Inc. 145 Idaho 904, 911 (2008). The language "shall" and "all" of Rule 15(b) is mandatory and comprehensive leaving no wiggle room for its applicability. Rule 15(b) treats issues the parties consensually try to the court in ***all*** respects as if the parties had raised the issues in a pleading. This rule applies "even if the issue is one which should have been raised in a compulsory counterclaim." *Aho v. Maragos*, 605 N.W.2d 161 (N.D. 2000).

Kinghorn and Clay expressly consented to trial of the issue of Kinghorn's breach of the loan agreement through their stipulation and summary judgment. Having neither filed nor raised at any time an objection to the stipulation or resolving this issue on summary judgment, BRP impliedly consented to trying Clay's claim for Kinghorn's breach of the loan agreement on summary judgment. Thus, under Rule 15(b), Kinghorn, Clay, and BRP tried Clay's counterclaim for breach of the loan agreement to the court. Moreover, under Rule 15(b), Clay's counterclaim "***shall*** be treated in ***all*** respects" as if Clay had raised it in the pleadings. Clay submits that this mandatory and comprehensive language applies to satisfy the counterclaim requirement contained in Idaho Code § 3-205.

B. Not Applying Rule 15(b) In This Context Promotes Judicial Waste.

If this Court does not apply Rule 15(b) broadly and treat Clay's counterclaim as if raised in the pleadings "in all respects" as the Rule requires, the result will be superfluous filings from lawyers who will file needless pleadings in an abundance of caution for fear they will be the next exception to Rule 15(b).

C. Equity And The Intent Of Idaho Code § 3-205 Favor Attorney Smith's Charging Lien.

"Variously phrased, the intent of the law [Idaho Code § 3-205] . . . is to allow the attorney an interest in the fruits of his skill and labors. The lien secures his right to compensation for obtaining the recovery or fund for his client." *Skelton v. Spencer*, 102 Idaho 69, 75 (1981) (citations omitted). Moreover, "where he [the attorney] has produced a fund, he has an equitable interest therein recognized by the lien statute and relevant case law." *Id.*

Here, Attorney Smith's skill and labor resulted in a fund payable to Clay in the amount of $22,235.33. Attorney Smith created the fund when the district court issued a favorable decision requiring that Kinghorn pay Clay the $22,235.33. Thus, Attorney Smith has satisfied the intent of Idaho Code § 3-205. Moreover, under *Skelton*, Attorney Smith has an equitable interest in the fund that he created.

BRP wrongly asserts that Attorney Smith's efforts on Clay's behalf were sterile. BRP misreads this language in *Skelton*. The "sterile efforts" language in *Skelton* is merely flowery language to describe the existence of a fund. In other words, if the attorney's efforts are fruitful, he has created a fund to which his lien can attach. If the attorney's efforts are "sterile," then he has created no fund to which his lien can attach.

BRP cites *Skelton* to say Attorney Smith's efforts were "sterile"; therefore, Attorney Smith produced no fund to which a lien could attach. BRP claims Attorney Smith's efforts were sterile explaining, "Attorney Smith did not recover a fund on behalf of Clay because he merely defended

and protected Clay's interest in the property."[8] However, Attorney Smith obtained a court order requiring Kinghorn to pay Clay $22,235.33. Obviously, this is a "fund." The reason BRP ignores this reality and claims Clay "merely defended and protected Clay's interest in the property" is that BRP ignores application of Rule 15(b) where Clay prevailed on his counterclaim that all parties consensually tried on summary judgment.

BRP further claims that Attorney Smith's efforts were sterile creating no "fund in favor of Clay because BRP is entitled to a setoff of the damages it was awarded on its cross-claim against Clay."[9] Clay addresses in detail BRP's faulty setoff argument later in this brief. However, BRP's argument is flawed because BRP has no right of setoff on Clay's successful counterclaim against Kinghorn. Specifically, BRP has no competing claim against Clay for his successful recovery against Kinghorn. In other words, only Kinghorn could possibly have a claim for setoff against Clay's recovery against Kinghorn, not BRP.

In short, equity and the intent of Idaho Code § 3-205 favor Attorney Smith's charging lien where Attorney Smith created a fund to which a lien could attach. And BRP's argument that Attorney Smith's efforts were "sterile" is without merit.

D. The Express Language Of The Charging Lien Statute Creates A Lien In Favor Of Attorney Smith.

The plain language of the attorney's lien statute comports with Attorney Smith's assertion that Attorney Smith has satisfied the requirements for an attorney's charging lien. The statute

8 Brief Of Respondent BRP Incorporated, p. 16.
9 Brief Of Respondent BRP Incorporated, p. 17.

states, in relevant part:

> From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come;

Idaho Code § 3-205.

Here, an action was commenced in which Attorney Smith appeared in behalf of Clay, a party to the action. Accordingly, Attorney Smith has a lien upon Clay's cause of action for breach of the loan agreement, which lien attached to the favorable decision requiring Kinghorn to pay $22,235.33 to Clay. The proceeds are currently in the hands of BRP, and Attorney Smith has a lien on those funds. Thus, applying the statute itself gives Attorney Smith a lien.

BRP wrongly relies on *Kenneth F. White, Chtd. v. St. Alphonsus Regional Medical Center*, 136 Idaho 238 (Ct. App. 2001) for the proposition that Attorney Smith cannot have a lien where Clay filed no counterclaim. *White* is easily distinguished because in *White* there was no action commenced whereas here Kinghorn filed an action, and Clay recovered the funds in that action pursuant to a favorable court decision. Accordingly, this Court should distinguish the Court of Appeals authority BRP relies on.

III.

BRP HAS NO CLAIM TO CLAY'S FUNDS BECAUSE BRP RELIES ON A PREJUDGMENT WRIT OF ATTACHMENT PROCEDURE AFTER BRP OBTAINED A JUDGMENT.

A prejudgment writ of attachment procedure applies only before a party obtains a judgment. Idaho Code Section 8-501 states, in relevant part:

> The plaintiff at the time of the issuing of summons, or at any time afterwards may make application to have the property of the defendant attached in accordance with the procedures provided for in this chapter, *as security for the satisfaction of any judgment that* ***may be recovered***, unless the defendant gives security to pay such judgment as in this chapter provided in the following cases.

Idaho Code § 8-501 (emphasis added). Moreover, Idaho Code Section 8-502(e) provides "[u]pon the hearing on the order to show cause, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination of whether there is a reasonable probability *that the plaintiff will prevail in its claim*. . . . The court may direct the order in which the writ shall be levied upon different assets of the defendant, if, in the aggregate, they exceed in value an amount clearly *adequate to secure any judgment which may be recovered by the plaintiff*." (Emphasis added).

Taken together, the quoted portions of Sections 8-501 and 8-502(e) envision a writ of attachment procedure that applies prejudgment to secure satisfaction of a future judgment that a plaintiff may obtain, not to a judgment the plaintiff has already obtained. Accordingly, the writ of attachment procedure under Section 8-501, et. seq. does not apply where the plaintiff already has a judgment that he simply seeks to enforce.

Here, BRP obtained a judgment against Clay on January 26, 2010.[10] Afterwards, BRP sought to implement the prejudgment writ of attachment procedure under Section 8-501 to attach Clay's proceeds.[11] However, this procedure applies only prejudgment, not post judgment, because its purpose is to secure any judgment that the plaintiff *may* recover. BRP relied on the

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10 R Vol. II, p. 215.

wrong procedure to attach Clay's proceeds. Having already obtained a judgment, BRP should have executed on the proceeds under Idaho Code Section 11-102. Accordingly, BRP did not attach Clay's proceeds.

IV.

BRP HAS NOT SUED ON A CLAIM FOR WHICH BRP COULD OBTAIN A WRIT OF ATTACHMENT.

Idaho Code § 8-501 states that a plaintiff may obtain a writ of attachment "***In an action upon a judgment, or upon contract, express or implied, for the direct payment of money***." Thus, under Section 8-501, a plaintiff may obtain a pre-judgment writ for one of two purposes: A plaintiff can obtain a pre-judgment writ when suing upon a judgment obtained in a prior proceeding; or a plaintiff can obtain a pre-judgment writ when suing on a contract for the direct payment of money. This situation fits neither of those requirements. BRP did not sue Clay on any judgment. Nor did BRP sue Clay on any contract for the direct payment of money. BRP sued Clay on a warranty deed. Even assuming a warranty deed is a "contract," the warranty deed was not a contract for the direct payment of money. Thus, this case is not even a proper case for a writ of attachment under Section 8-501.

V.

BRP'S SETOFF ARGUMENT IS WITHOUT MERIT.

BRP claims that it has a setoff against any funds Kinghorn owed to Clay. BRP cites Idaho Rule of Civil Procedure (54)(b),which states:

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11 R Vol. II, p. 234.

> If any parties to an action are entitled to judgments against each other such as on a claim and counterclaim, or upon cross-claims, such judgments shall be offset against each other and a single judgment for the difference between the entitlements shall be entered in favor of the party entitled to the larger judgment.

I.R.C.P. 54(b). BRP and Clay are neither cross-claimants, nor do they have a claim and counterclaim or offsetting judgments against each other. Setoff is allowed if judgments are awarded "where competing claims arise out of the same transaction or instrument." *Banque Indosuez v. Sopwith Holdings Corp.*, 772 N.E.2d 1112, 1117 (N.Y. 2002).

Here, BRP's claims do not arise out of the same transaction or instrument as Clay's breach of contract claim against Kinghorn that lead to Attorney Smith's recovery of the fund. Clay's counterclaim arises under the breach of loan agreement between Clay and Kinghorn, while BRP's claim arises under a breach of warranty deed between Clay and BRP. The setoff rule requires "judgments against each other" which does not exist here and which BRP has not claimed. If the $22,235.33 paid to Clay were in satisfaction of a judgment against BRP a setoff would be appropriate, but such is not the case.12

BRP curiously cites *Brown v. Porter*, 42 Idaho 295, 245 P. 398 (1926) for the proposition that except where denied or limited, the right of setoff exists in Idaho. *Brown* is inapposite as it deals only with whether a bank can setoff debts a depositor owes with money deposited for other purposes. There was no issue involving a cross-claim or claim and counterclaim or competing judgments in the facts of *Brown* whatsoever. Furthermore, in every case BRP cites in which a

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12 Interestingly, BRP acknowledges that Clay recovered on his counterclaim against Kinghorn for purposes of BRP's setoff argument but turns a blind eye to Clay's recovery on his counterclaim against Kinghorn for purposes of Attorney

setoff was allowed, none involve setoff by party A of an amount owed between parties B and C, as BRP desires in this case. In all cases BRP cites, the parties had competing judgments against each other which were setoff.

BRP cites *Dawson v. Eldredge*, 89 Idaho 402 (1965), which is not about an attorney's lien but a mechanic's lien involving only two litigants with competing claims and judgments. *Id.* at 409. BRP cites *Banque Indosuez*, 772 N.E.2d 1112 (N.Y. 2002) for the proposition that an attorney's lien is only recoverable against a client's net recovery after setoff. That same case states that "an attorney's charging lien maintains superiority over a right of setoff where the setoff is unrelated to the judgment or settlement to which the attorney's lien attached." *Id.* at 1117. *Banque Indosuez* involves one defendant and one class of plaintiffs. In this respect, the facts differ greatly from the present case. Here, the judgment BRP seeks to offset is unrelated to the judgment or settlement to which Attorney Smith's lien attached; therefore, Attorney Smith's lien is superior to BRP's claim of setoff.

BRP cites *Reed v. Reed*, 10 S.W.3d 173 (Mo.Ct.App. 1999) for the same proposition as *Banque Indosuez*. But that case sheds even more light on the requirement that the competing claims arise under the same transaction. "If, however, the right to set off [is of] a demand wholly unrelated to the matter out of which sprung [the attorney's lien] then the attorney's lien takes priority. Thus, for instance, [this court] held that the attorney's lien took priority over the claim of set-off where the second judgment was based on tort and the first on contract, as those are

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Smith's lien under Idaho Code Section 3-205.

unrelated causes of action." *Id.* at 179 (internal citations and quotations omitted).

Here, the Kinghorn dispute which led to Clay's recovery was a breach of the loan agreement. BRP's claim, however, is for breach of a warranty deed. It does not arise under the same facts, transaction or instrument. Thus, this case is like *Reed* where ***parties with competing judgments*** could not claim a setoff because of the unrelated causes of action.

BRP cites *Hobson Construction Co. v. Max Drill, Inc.*, 385 A.2d 1256 (N.J.Super. Ct. App. Div. 1978) for the proposition that allowing Attorney Smith's lien violates principles of equity because "the party holding the excess judgment should not be burdened by the fee of the attorney representing the losing litigant." *Id.* at 1258. This case, like all others BRP relies on, deals only with two parties holding competing judgments. This case is inapposite as Attorney Smith is seeking lien priority for funds resulting from a claim against Kinghorn, not between BRP and Clay.

Finally, BRP cites *Galbreath v. Armstrong*, 193 P.2d 630 (Mont. 1948) which also involves only two competing counterclaims and judgments. *Id.* at 390. To extend the reach of *Galbreath* and other cases with competing and offsetting judgments to this case would require an application not contemplated by any of the cited cases. In all those cases, a setoff involves competing judgments where A owes B an amount and B owes A an amount and the party with the greater judgment amount is paid the difference. Here, Kinghorn filed no claim against BRP, BRP filed no claim against Kinghorn. The only connections between Kinghorn and BRP are the property (not instruments) and Clay. Accordingly, Attorney Smith's lien is superior to BRP's claimed attachment making Attorney Smith entitled to possession of the Clay funds.

VI.

IF ATTORNEY SMITH'S LIEN AND BRP'S WRIT ARE INVALID THE MONEY BELONGS TO CLAY.

If Attorney Smith's charging lien is valid and superior to any lien BRP may have by virtue of its writ of attachment, then the $22,235.33 should be paid to Attorney Smith. If Attorney Smith's charging lien is invalid but BRP's writ of attachment is meritorious, then BRP should keep the money. But if Attorney Smith's charging lien and BRP's writ of attachment are both invalid, then Clay should get the money. This is important because the district court concluded that Attorney Smith's charging lien was invalid and ordered the money turned over to BRP without considering the validity of BRP's petition for writ of attachment. The district court failed to consider that if BRP's petition were invalid, Clay should get the money.

VII.

CONCLUSION.

For all the reasons set forth in this brief, Attorney Smith respectfully requests that the Court reverse the order of the district court, recognize Attorney Smith's charging lien, award costs on appeal to Attorney Smith, order BRP to return the $22,235.33 to the district court, and remand this case to the district court to determine the proper amount of attorney's fees to be awarded Attorney Smith to be paid from the $22,235.33.

Alternatively, if this Court does not recognize Attorney Smith's charging lien, then this Court should find that BRP has no right to a writ of attachment, order BRP to return the $22,235.33 to the district court, where the district court can order the money returned to Clay.

DATED this 7th day of October, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By _____
Bryan D. Smith
Attorneys for Defendant
Kelly N. Clay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 2011, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Alan Johnston, Esq. Pike, Herndon, Stosich & Johnston 151 N. Ridge Ave., Suite 210 Idaho Falls, ID 83403-2949	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
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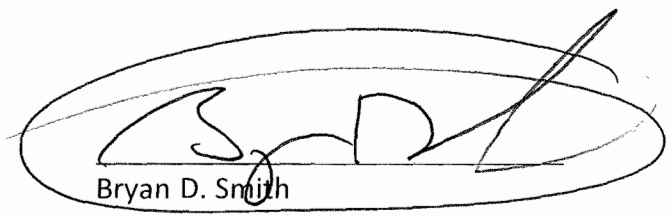

Bryan D. Smith